

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA**

HARVEY PATRICK SHORT,

Plaintiff,

v.

**CIVIL ACTION NO. 2:09-CV-119
(Bailey)**

**COMMISSIONER OF
SOCIAL SECURITY,**

Defendant.

ORDER

On September 9, 2010, Magistrate Judge John S. Kaull filed his Report and Recommendation (R&R) (Doc. 31) in the above-styled matter wherein the parties were directed, in accordance with 28 U.S.C. § 636(b)(1), to file with the Clerk of Court any written objections within fourteen (14) days after being served with a copy of the R&R. Plaintiff filed objections on September 20, 2010 (Doc. 33), and defendant responded to Plaintiff's objections on October 6, 2010 (Doc. 37). This matter now appears ripe for review.

Upon examination of the report from the Magistrate Judge, it appears to this Court that the issues raised in the defendant's motion to dismiss [Doc. 21] was thoroughly considered by Magistrate Judge Kaull in his R&R. Magistrate Judge Kaull has recommended that this matter be remanded to the Commissioner for a hearing before an ALJ regarding plaintiff's claim for benefits while he was incarcerated. In his objections, the plaintiff argues that the Court should award him such benefits without a remand.

Upon consideration of the plaintiff's objections, the Court finds that the plaintiff has not raised any issues that were not thoroughly and properly considered by the Magistrate Judge in his R&R. As found by the Magistrate Judge, the undersigned also finds that, while plaintiff was denied due process in appealing his claim, this Court does not have the

information available, or the authority, to make a determination regarding the merits of the original Complaint. Such evaluation of the evidence is reserved to the ALJ. Plaintiff's objections are overruled. The Court, upon an independent *de novo* consideration of all matters now before it, is of the opinion that the proposed R&R accurately reflects the law applicable to this case. Accordingly, this Court agrees with the Magistrate Judge that this matter must be remanded. Therefore, it is

ORDERED that Magistrate Judge Kaull's R&R (Doc. 31) be, and the same hereby is, **ADOPTED**. In accordance with the R&R, it is

ORDERED that the defendant's Motion to Dismiss (Doc. 21) be, and the same hereby is, **DENIED**. It is further

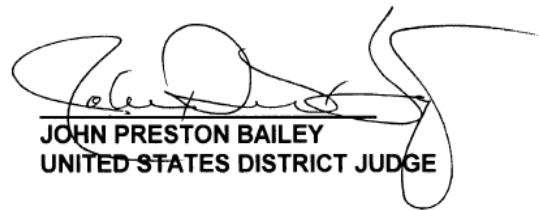
ORDERED that this matter is **REVERSED AND REMANDED** to the Commissioner pursuant to the fourth sentence of 42 U.S.C. § 405(g) for further action in accordance with this Order and the R&R. It is further

ORDERED that the plaintiff's Motion for Appropriate Relief (Doc. 44) shall be, and the same hereby is, **DENIED**. It is further

ORDERED that the Clerk of Court shall enter judgment reversing the decision of the ALJ and remanding the case to the ALJ for further proceedings and shall thereafter **DISMISS** this action from the docket of the Court.

The Clerk of Court is directed to enter a separate judgment and to send a copy of this Order to all parties appearing herein.

DATED: January 28, 2011.



JOHN PRESTON BAILEY
UNITED STATES DISTRICT JUDGE